

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-8698

File: 47-405867 Reg: 06063515

ANTANACIO MORALES, dba Casa Azteca Bar & Grill
9447 East Rush Street, South El Monte, CA 91773,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: none

Appeals Board Hearing: August 7, 2008

Los Angeles, CA

ISSUED DECEMBER 3, 2008

Antanacio Morales, doing business as Casa Azteca Bar & Grill (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his license, with revocation stayed for a probationary period of three years, and suspended his license for 15 days for violating, or permitting violation of, Business and Professions Code² sections 24200.5, subdivision (b), and 25657, subdivision (b).

Appearances on appeal include appellant Antanacio Morales, appearing through his counsel, Ralph B. Saltsman, Stephen W. Solomon, and Julia H. Sullivan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

¹The decision (Corrected Copy) of the Department, dated August 18, 2006, is set forth in the appendix, as is the original decision, of the same date. The stipulation and waiver and an acknowledgment form are included for reference.

²Unless otherwise indicated, statutory references in this opinion are to the Business and Professions Code.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on April 5, 2004. The Department issued an accusation against appellant, dated June 30, 2006, charging various drink solicitation violations. On that same date, appellant signed a stipulation and waiver in which he acknowledged receipt of the accusation, stipulated to disciplinary action being imposed based on the facts in the Department's investigative files, and waived all rights to a hearing, reconsideration, and appeal. He also acknowledged the discipline to be imposed was revocation stayed for three years and a 15-day suspension.

The Department's decision, dated August 18, 2006, acknowledged the stipulation and waiver, found that the stipulation and waiver established grounds for discipline, and imposed the above-described discipline. It also stated it was effective immediately; i.e., on August 18, 2006.

Appellant appealed this decision on September 13, 2006. The Board accepted the appeal and designated it as AB-8602. The Department filed a motion to dismiss the appeal on October 30, 2006, asserting the appeal was untimely because not filed within 10 days of the effective date of the decision as required by section 23081.³

³ Section 23081 provides:

On or before the tenth day after the last day on which reconsideration of a final decision of the department can be ordered, any party aggrieved by a final decision of the department may file an appeal with the board from such decision. The appeal shall be in writing and shall state the grounds upon which a review is sought. A copy of the appeal shall be mailed by the appellant to each party who appeared in the proceeding before the department, including the department which shall thereafter be treated in all respects as a party to the appeal. The right to appeal shall not be affected by failure to seek reconsideration before the department.

The Department's attorney, Matthew Ainley, then realized that the statutes listed in the decision as having been violated erroneously showed section 25658, subdivision (a), instead of Penal Code section 647, subdivision (b). Ainley spoke with appellant's counsel, informing them of the Department's intention to issue a corrected decision. Appellant's counsel agreed to withdraw their appeal pending issuance of the corrected decision. (Letter to Ainley dated 11/14/2006.) The appeal was withdrawn and the Board ordered it dismissed on November 30, 2006.

On April 27, 2007, the Department issued a decision captioned "Corrected Copy." This decision omitted the incorrect reference to section 25658 and included the correct reference to Penal Code section 647, subdivision (b). The date of the decision remained the same – August 18, 2006.

On May 4, 2007, appellant filed a notice of appeal from the corrected decision. The Appeals Board accepted the appeal and designated it AB-8698. Appellant contends the Department's decision must be reversed because of "gross procedural irregularities."

DISCUSSION

Appellant contends that the Department's decision must be reversed, or reversed and remanded for a hearing on the merits, because of "gross procedural irregularities." The Department, he says, has failed "to ensure that its records are complete, that its records are accurate, and its actions consistent with constitutionally protected due process rights." (App. Closing Br. at pp. 1-2.) The "gross procedural irregularities" appellant alleges consist of: the "backdating" of the corrected copy of the decision; the "specter" of impermissible ex parte communications; and the lack of the accusation in the record.

Appellant signed a stipulation and waiver, agreeing to waive all rights to a hearing, reconsideration, and appeal. The Appeals Board accepts appeals from decisions based on stipulation and waiver, but only for the limited purpose of challenging the validity of the stipulation and waiver. A stipulation and waiver is governed by contract principles. (*Frankel v. Bd. of Dental Examiners* (1996) 46 Cal.App.4th 534, 544 [54 Cal.Rptr.2d 128].) A stipulation, like other contracts, may be rescinded only if it was procured through fraud, duress, undue influence or mistake. Therefore, this agreement is binding on appellant, absent fraud, mistake, undue influence, or duress. (*Alhambra Police Officers Assn. v. City of Alhambra Police Dept.* (2003) 113 Cal.App.4th 1413, 1420 [7 Cal.Rptr.3d 432].)

Appellant's opening brief does not, by any stretch of the imagination, raise the issue of rescission of the stipulation and waiver. Nor does it allege any fraud, duress, undue influence, or mistake on appellant's part when entering into that contract. After the Department's brief pointed out that the fundamental basis for an appeal was lacking, appellant filed a closing brief attempting to cure the deficiency. In that brief, he raised a new issue – that his "waiver of constitutional rights" was not entered into voluntarily and knowingly. He expresses "concerns over the adequacy of the translation" provided, said he felt "rushed and pressured in his meeting with the Department," and asserts that he does not remember signing the stipulation and waiver.

The court in *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 763-766 [60 Cal.Rptr.2d 770], when presented with a reply brief raising new issues, rejected that appellant's attempt:

We refuse to consider the new issues raised by defendant in his reply brief. "Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument." (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 [13 Cal.Rptr.2d 432].) "Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant." (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11 [142 Cal.Rptr. 429, 572 P.2d 43].) " 'Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an additional brief by permission. Hence the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.' " (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8 [265 Cal.Rptr. 788].)

We also refuse to consider this new issue.⁴ Appellant is bound by the stipulation and waiver he signed and has not raised a justiciable issue before this Board.⁵

ORDER

The appeal is dismissed.⁶

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴We note that neither the brief nor the attached declaration of appellant alleges that appellant lacks proficiency in understanding, speaking, or reading the English language.

⁵In disposing of this appeal without considering the "merits," we do not mean to imply that appellant's original contentions regarding "gross procedural irregularities" have any merit.

⁶This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.